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BRIEF OF AMICUS CURIAE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 682.

LUPE ALONZO, JIM ALONZO, JOE ALONZO and VALENTINO ALONZO, Petitioners,

vs.

UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari To The Court of Appeals For The Tenth Circuit

FRED M. STANSELL,

Attorney General for the State of New Mexico.

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The United States Court of Appeals for the Tenth Circuit erred in two respects:

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and

Two: In the holding that even if the United States under the terms of the Enabling Act for the State of New Mexico did relinquish control and jurisdiction over such lands, that control and jurisdiction over this category of lands was reacquired by the United States under the terms of Section 17 of the Pueblo Lands Act of 1924 ..... 4, 5

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PRELIMINARY STATEMENT

Brief Amicus Curiae In Support Of Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit.

Comes now the State of New Mexico by its Attorney General and pursuant to Supreme Court Rule 2 (d) files this brief Amicus Curiae in support of petition for Writ of Certiorari in the above captioned case, directed to the United States Court of Appeals for the Tenth Circuit to review the judgment entered September 25, 1957, in the case of Lupe Alonzo et al. vs. United States of America.

The questions presented to this Court which make it imperative upon the State of New Mexico in its sovereign capacity to ask for leave of this Court to file Brief Amicus Curiae are three:

One: The United States Court of Appeals for the Tenth Circuit in its opinion has held that the Enabling Act admitting the State of New Mexico into the Union and so much of the Enabling Act as was incorporated and made a part of the Constitution of the State of New Mexico were by unilateral Act of Congress amended, notwithstanding the bilateral character of the Enabling Act.

Two: The United States Court of Appeals for the Tenth Circuit in its opinion by disregarding the bilateral character of the New Mexico Enabling Act and heretofore recognized rules of statutory interpretation, interpreted the New Mexico Enabling Act and the Constitution of the State of New Mexico contrary to the interpretation given them by the highest Court of the State of New Mexico.

Three: The United States Court of Appeals for the Tenth Circuit by extending the application of three decisions of this Court has diminished the integrity and invaded the powers of the State Judicial system.

Because the last mentioned question is so closely integrated with the legal proposition raised by the real parties in interest, the State of New Mexico at this time will limit its grounds to the first two grounds above enumerated.

By this it is not intended that any inference whatsoever may be drawn that the State of New Mexico is not affected by a ruling on the last numbered question.

STATEMENT OF THE CASE

The petitioner has in its petition for a Writ of Certiorari furnished this Court with a "Statement of the Case". But in order that the position of the State of New Mexico may appear in its proper perspective, the petitioner's statement of the case will be briefly supplemented.

On January 28, 1957, the Alonzos, Indian members of the Pueblo of Laguna, filed a suit in ejectment against the Pueblo of Laguna and its lessee, The Anaconda Company, hereinafter referred to as State 8016.

On February 21, 1957, the United States filed a suit in the United States District Court for the District of New Mexico praying to quiet title to the property covered in State 8016. The Federal suit is hereinafter referred to as Federal 3407. By Federal 3407, the United States further asked the Federal District Court to enjoin the party litigants to State 8016.

During the argument on the order to show cause in Federal 3407, the attention of the United States District Judge was called to Article 21, Section 2, New Mexico Constitution, which is the same as New Mexico Enabling Act, 36 Stat. 567, Section 2.

From an order of the Federal Court enjoining the State proceedings the Alonzos', plaintiffs in State 8016, took an appeal to the United States Court of Appeals for the Tenth Circuit. At that time, the State of New Mexico apprehended that a ruling by the Court of Appeals for the Tenth Circuit would of necessity require an interpretation of the New Mexico Enabling Act and the Constitution of the State of New Mexico, filed a motion in the Court of Appeals for leave to be allowed to intervene or in the alternative for leave to be allowed to file brief amicus curiae.

The State's motion for leave to intervene was denied, but leave was given the State to file brief amicus curiae. Leave was asked by the State for time within which to present oral argument. The Court of Appeals denied this request and because in part the position taken by the State of New Mexico coincided with the position taken by the appellants to the Court of Appeals, the remedy left the State was to ask permission from the appellants for part of their time within which to present its position. The appellants ceded to the State of New Mexico ten minutes of their time for argument.

There after on the 25th day of September, 1957, the Court of Appeals for the Tenth Circuit speaking through Justice Orie L. Phillips filed its opinion and judgment was entered on the same date.

ARGUMENT

A. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED IN TWO RESPECTS:

ONE: IN HOLDING THAT UNDER THE TERMS OF THE ENABLING ACT FOR THE STATE OF NEW MEXICO THE UNITED STATES DID NOT RELINQUISH CONTROL AND JURISDICTION TO THE STATE OVER LANDS OF INDIANS WHICH WERE NOT ACQUIRED BY THEM "THROUGH OR FROM THE UNITED STATES OR ANY PRIOR SOVEREIGNTY"; AND,

TWO: IN THE HOLDING THAT EVEN IF THE UNITED STATES UNDER THE TERMS OF THE ENABLING ACT FOR THE STATE OF NEW MEXICO DID RELINQUISH

CONTROL AND JURISDICTION OVER SUCH LANDS, THAT CONTROL AND JURISDICTION OVER THIS CATEGORY OF LANDS WAS REACQUIRED BY THE UNITED STATES UNDER THE TERMS OF SECTION 17 OF THE PUEBLO LANDS ACT OF 1924.

The lands in dispute are lands claimed by the Pueblo of Laguna to have been acquired by it by purchase and claimed by the Alonzos' to be owned by them in fee simple title from a time prior to the Treaty of Quadalupe Hidalgo (R. 10).

The Court of Appeals held the lands to be included within the disclaimer provision of the Enabling Act, 36 Stat. 557, 558, 559, even though they were acquired by purchase. It further held that even if the lands acquired by purchase had come under the jurisdiction of the State of New Mexico like other private lands under the Enabling Act, in effect the Enabling Act of New Mexico had been amended by Section 17 of the Act of 1924. The Enabling Act of New Mexico insofar as pertinent hereto, is attached hereto as Appendix A. Section 17 of the Pueblo Lands Act of 1924 (43 Stat. 636) is attached hereto as Appendix B.

The language of the New Mexico Enabling Act, insofar as the disclaimer provision is concerned, appears to be peculiar to the States of New Mexico and Arizona. It is different from the Enabling Act of such other states as Oklahoma, Washington, Colorado, Utah, Montana, Idaho, Kansas, to mention a few. The Enabling Acts of the last-referred-to states required of the incoming states that they disclaim all lands owned or occupied by Indians or Indian tribes, while the New Mexico and Arizona Enabling Acts required of those two states that they disclaim *only*

those lands owned or held by any Indian or Indian tribes *'the right or title to which shall have been acquired through or from the United States or any prior sovereignty.'*

This same provision was incorporated and adopted by the people of the territory of New Mexico in the Constitution of the State as New Mexico Constitution, Article 21, Section 2, 9. The Enabling Act makes this provision irrevocable without the consent of the people of the State of New Mexico and Congress of the United States. That such provision and Enabling Acts are bilateral compacts has long been established and recognized by this Court. Cf. Stearns vs. Minnesota, 179 U.S. 223; Ward v. Racehorse, 163 U.S. 504; Ft. Leavenworth Railway Co. vs. Lowe, 114 U.S. 525. The effect of the failure to disclaim lands by a state being admitted into the Union is that the United States thereafter even as to lands it may own in fee simple stands in no different position than any other proprietor of land within the territory of the State. In the *Ft. Leavenworth Railway Co. vs. Lowe* case, supra, this Court had occasion to pass upon the precise question raised here and ruled contrary to by the Court of Appeals for the Tenth Circuit. In that case the United States had acquired and created the Ft. Leavenworth military reservation within the Kansas territory. Upon admission of the State of Kansas, the Enabling Act, Act January 29, 1861, Chapter 20, Section 1, 12 Stat. 126, failed to require of the people of the State of Kansas that they disclaim the land occupied by the Ft. Leavenworth military reservation. Whether this omission was through inadvertence or by design was immaterial to the question herein presented. Nevertheless, after the adoption of the Enabling Act by the people of Kansas, the United States recognized the desirability of jurisdiction over the military reservation. At the request of the United States, the State of Kansas by Legislative

enactment[1] disclaimed to the United States the lands occupied by the Ft. Leavenworth military reservation. After this enactment, the State of Kansas sought to impose a tax on the Ft. Leavenworth Railway Company within the Ft. Leavenworth military reservation. The Railway challenged the Constitutional right of the State of Kansas to impose any tax within the reservation. In holding that the State of Kansas had the power to tax within the military reservation, this Court speaking through Justice Field said:

> "The land constituting the reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the State of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the Union upon an equal footing with the original states; that is, with the same rights of political dominion and sovereignty, subject like them only to the constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political

[1] That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the "Fort Leavenworth Reservation" in said state, as declared from time to time by the president of the United States, saving, however, to the said state the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of said cession and reservation; and saving further to said state the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation. Laws Kan. 1875, p. 95.

authority, dominion, and legislative power of the United States over the reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But from some cause, inadvertence perhaps, or overconfidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. *The United States, therefore, retained, after the admission of the state, only the rights of an ordinary proprietor*;" (Emphasis supplied).

The Kansas Enabling Act to which Mr. Justice Fields refers, required of the people of Kansas that they disclaim and that exclusive jurisdiction be ceded to the United States of all lands owned or occupied by Indians or Indian tribes within the territory.*

This Court in The Kansas Indians, 5 Wall. 667, had occasion to comment on the language of the Kansas Enabling Act concerning Indian lands. This Court has held that whenever the United States intended to retain jurisdiction over Indian lands within the territory of a newly created state, the burden was upon the United States to do so by express reservation. In *United States v. McBratney*, 104 U.S. 621, 624, this Court stated:

*Provided that nothing contained in said constitution respecting the boundary of said state shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said State, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this Act had never passed.

> "Whenever, upon admission of a state into the Union, Congress has intended to except out of it an *Indian reservation*, or the sole and exclusive jurisdiction over that reservation, it has done so by express words." (Citing the *Kansas Indians*, 5 Wall. 737; United States vs. Ward, 1 Woolw. 17).

Not one of the foregoing decisions of this Court has been modified or overruled. In the case at bar the holding of the Court of Appeals for the Tenth Circuit is not only contrary to the holdings of this court but ignores the legislative history. The legislative history shows that the contracting parties, i.e. the United States and the Territory of New Mexico, had considered and failed to agree on an enabling act such as the opinion of the Court now imposes upon the State of New Mexico.

The Enabling Act of 1906, 34 Stat. 267, provided for the admission of the Territory of Oklahoma as one state and the territories of Arizona and New Mexico as another state. Oklahoma complied with the requisites and became a state. The territories of Arizona and New Mexico failed to comply. Insofar as pertinent herein, the 1906 enabling legislation asked of the three territories that they disclaim all right and title to all lands owned or held by any Indian or Indian tribes. All lands owned or held by any Indian or Indian tribes was to remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. Specifically, the proposed ordinance read as follows:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any

> Indian or Indian tribes, except as hereinafter provided, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and such Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *."

The Act of 1910, which is the Act in question, as compared to the 1906 Act had a radical change. Under it, the United States retained absolute jurisdiction and control of only those lands 'owned or held by any Indian or Indian tribes, the right to title to which shall have been acquired through or from the United States or any prior sovereignty'. Why the United States did not impose the broad demands of the 1906 Act in the 1910 Act is not clear, but the reason is unimportant. The holding of the Court of Appeals interprets the 1910 Enabling Act as if it read the same as the 1906 Enabling Act or as if the 1910 Enabling Act had been amended by the Pueblo Lands Act of 1924, supra, to read as the 1906 Act.

The Court of Appeals, notwithstanding the holdings of this Court, held that in effect although lands acquired by purchase by Indian Pueblos were not specifically mentioned in the New Mexico Enabling Act, that it must have been the intention to include them as part of the disclaimer. The interpretation given the New Mexico Enabling Act by the Court of Appeals for the Tenth Circuit is contrary to the interpretation given it by the Supreme Court of New Mexico in the case of *Trujillo v. Prince*, 42 N.M. 337, 78 P. 2d 145 (1938), in which case, the United States through the Department of Justice aligned itself with the successful Indian party as Amicus Curiae. The language of the New Mexico Supreme Court, insofar as pertinent, is quoted as follows:

"It is to be observed that this provision did not in any wise fetter or limit the Indian if a resident of this state so far as to deny to him any right political or otherwise enjoyed by any other resident of this state. The only restriction was as to his title to land acquired by him by virtue of the laws of the United States or any prior sovereignty and also restricting the power of the state to tax the land of the Indian so held and acquired or which might thereafter be granted or confirmed to any Indian or Indians under an Act of Congress. *With these exceptions there is reserved to the state the power to tax the lands and other property of Indians. This reservation of power in the state implies the consent of Congress to acquisition by reservation Indians of land* and property outside of an Indian reservation and *outside of lands and property granted to him by Congress,* which outside property will become subject to taxation. It is manifest that *it would be idle for Congress to stipulate that the state could tax certain lands* and property of Indians if the Indians are powerless to acquire such lands and property. *The power to tax property carries* with it the power of the state to dispose thereof to *enforce the payment of delinquent taxes. The Courts will be open to the Indian taxpayer to make any defenses which are open to other taxpayers similarly situated.* Such defenses would doubtless be open to the personal representative of a deceased taxpayer. The state could doubtless enforce its claim for taxes against a deceased Indian's estate composed of property not in the field of restricted or qualified ownership. Suit to quiet title to land of Indian delinquent taxpayers acquired at tax sales would not likely be defeated because the Indian taxpayer was dead. His heirs and the administrator of his estate could doubt-

less, in appropriate circumstances, be made parties to such a suit." (Emphasis supplied.)

The holding of the Court of Appeals for the Tenth Circuit being in conflict with the holding of the New Mexico Supreme Court and against the holding of this Court, it is respectfully submitted that a ruling by this Court is immediately imperative. It is immediately imperative because the basic law of the State of New Mexico as well as the State of Arizona has been placed in dispute.

Now the Court of Appeals for the Tenth Circuit held that even if lands acquired by purchase by Indian Pueblos of New Mexico were not included in the Enabling Act, nevertheless by the Act of 1924 they were taken out of the jurisdiction of the State of New Mexico and the United States given such jurisdiction as to enable the United States to impose restrictions against alienation. The lower court's language is quoted as follows:

"* * * But if we be wrong in our conclusion, which we do not concede, that the Enabling Act did not by implication remove restrictions with respect to lands acquired by purchase, such restrictions were clearly reimposed by Section 17 of the Act of 1924 * * *" (43 Stat. 636).

The State of New Mexico contends that this holding of the lower court, to the effect that Congress may unilaterally impose restrictions on lands, sovereignty over which was retained by the State of New Mexico at the time of its admission as a State, violates the compact between the United States and the State of New Mexico.

The Arizona and New Mexico Enabling Acts constitute bilateral compacts entered into between the United States and the States of New Mexico and Arizona. See

Stearns v. Minnesota, supra; Ward v. Race Horse, supra; cf. James v. Dravo Contracting Co., 302 U.S. 134; Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 58 S. Ct. 1099; Beecher v. Weatherby, 95 U.S. 515. The Pueblo Land Act, 43 Stat. 636 is a unilateral act to which the people of New Mexico did not consent.

The holding of the Court of Appeals that the Act of 1924 changed the terms of the compact between the United States and the State of New Mexico ignores the fact that the compact specifically provides that the ordinance in question is "* * * irrevocable without the consent of the United States and the people of said state * * *." 36 Stat. 557, Chapter 310, Section 2. The particular provision making the ordinance irrevocable is but a restatement of a recognized principle of law approved by this Court each time the question has been before it.

The State of New Mexico, like every other state of the Union, is directly affected by such holding. It would be directly affected even by an inference that a bilateral compact by the State and the United States could be unilaterally amended by an Act of Congress.

As already stated under the first part of this brief, this Court has held that enabling legislation is a bilateral compact. cf. *Stearns vs. Minnesota Case*, supra; *Ward vs. Racehorse*, supra; *Fort Leavenworth Railway Co. vs. Lowe*, supra.

It is so well-settled as not to require the citation of further authority that an Enabling Act is a compact between the United States and a state which is bilateral in its nature. Such compact cannot be amended without the consent of the two parties. The holding of the Circuit Court of Appeals that the compact between the United States and New Mexico was amended by Congress through

the 1924 *Pueblo Land Board Act*, supra, in effect is a holding that Congress has the power to amend the compact without the consent of the other party. This holding has cast doubt upon the power of the individual states to govern in accordance with the terms of the compacts between them and the United States for if it is the law that Congress can amend Section 2 of the New Mexico Enabling Act, supra, by a subsequent legislative enactment, without the consent of the State of New Mexico, what restraint is there to the amendment of any other clause or section?

CONCLUSION

In conclusion, the State submits that insofar as the interpretation given the Enabling Act of the State of New Mexico and insofar as the Court has stated than an Enabling Act can be unilaterally amended, this Court must direct the Court of Appeals for the Tenth Circuit to reverse itself or clarify its language.*

Respectfully submitted,

FRED M. STANDLEY,

Attorney General for the
State of New Mexico.

*The Court of Appeals like the trial court relied heavily on the decision of this Court in United States v. Candelaria, 271 U.S. 561. Inasmuch as the issue presented in the Candelaria case was a broader one and not limited to the specific question here, and inasmuch as the interpretation and application of the New Mexico Enabling Act was not an issue, the case would not be controlling. However, since the Circuit Court, as well as the Government, has relied on it so heavily, it may be proper for this Court to re-examine the case at this time and a discussion is attached hereto as Appendix C.

APPENDIX A

Section 2 of the Enabling Act in the second paragraph provides:

> "That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof, that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

APPENDIX B

Section 17 of the Pueblo Lands Act reads:

"No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the lands of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

APPENDIX C

The Candelaria Case

While it is submitted that it is not necessary that the decision of this Court in United States v. Candelaria, 271 U.S. 432, 441, need be overruled in order to give the Enabling Act of the State of New Mexico the proper effect, nevertheless, it may be pertinent at this time to re-examine the decision of this Court in the Candelaria case. The Candelaria case would appear to have been filed some time prior to the enactment of the Pueblo Land Grant of 1924. It reached the Supreme Court not upon disputed questions of fact, but upon stipulated facts certified to this Court by the 8th Circuit Court for the purpose of raising the legal question. That the factual question was not seriously disputed or considered important enough by the party litigants is made evident by the discrepancies between facts as stated by the Supreme Court and the facts as stated by the Circuit Court of Appeals after the question certified to this Court had been ruled upon. This Court treated the lands as lands that had been acquired by grant by the Indians from a prior sovereign, that is, Spain. 271 U.S. 437.

Without pointing out or explaining the discrepancies, the Circuit Court of Appeals treated the lands as lands acquired by the Indians not by a prior sovereign, but by purchase from the grantee of a prior sovereign. 16 (F. 2d) 550. Taking the factual situation presented to this Court in the Candeleria case, its ruling might be proper and do no violence to the Enabling Act of the State of New Mexico. Taking the facts as found by the Circuit Court of Appeals after the case was remanded to it by this Court and the facts as admitted in this case, we find that violence would be done and is done to the Enabling Act of the State if the Candelaria decision is made to apply.

That certain material questions to the case at bar were considered unimportant by the parties' litigants, as well as the Court's in the Candelaria case, is evident from the treatment given by the Supreme Court to the Act of Congress of 1851, 9 Stat. 587.

This Court in the Candelaria case, speaking of the 1834 Indian Intercourse Act (4 Stat. 730, c 161, Sec. 12) stated:

> "This provision was originally adopted in 1834 (4 Stat. 730, c. 161, Section 12), and, with others 'regulating trade and intercourse with the Indian tribes' was extended over 'the Indian tribes' of New Mexico in the Act of 1851. 9 Stat. 587, c. 14, Section 7."

It is evident from the language of the Court as quoted above that the Court treated the 1851 Act as extending the provision of the 1834 Act and other law regulating trade and intercourse with the Indian tribes in their entirety. A reading of the 1851 Act discloses that this was not what Congress did. The Act of 1851 was entitled:

> "Feb. 27, 1851. CHAP XIV — An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes, for the Year ending June the Thirtieth, one thousand eight hundred and fifty-two."

Section 7 of this Act reads as follows:

> "And be it further enacted. That all the laws now in force, regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby extended over the Indian tribes in the Territories of New Mexico and Utah."

The Supreme Court was not urged and made no effort to determine where the laws enforced regulated trade and intercourse with the Indian tribes would be applicable, but treated the Act as extending them in toto. In order to determine how applicable such laws might have been, it would have been necessary to determine what treaties, stipulations were being fulfilled as suggested by the title of the act. At the time of the enactment of this legislation, there were no treaties between the Pueblo Indians of New Mexico and the United States but there were treaties by some of the non-Pueblo Indians and the United States. For example, on the 9th day of September, 1850, five months before the enactment of the 1851 Act, the United States had ratified a treaty with the Utahs. Paragraph 4 of the Treaty specifically provided as follows:

> "The contracting parties agree that the laws now in force, and such others as may be passed, regulating the trade and intercourse and for the preservation of peace with the various tribes of Indians, under the protection and guardianship of the Government of the United States shall be as binding and obligatory upon the said Utahs as if said laws had been enacted for their sole benefit and protection. And that said laws may be duly executed, and for all other useful purposes, the territory occupied by the Utahs is hereby annexed to New Mexico, as now organized, or as it may be organized or until the Government of the United States shall otherwise order." (p. 535, Vol. III, Leading Facts of New Mexico History — Twitchell)

The Supreme Court in United States v. Candelaria relied on its prior holding in United States v. Sandoval, 239 U. S. 28, 1913; in the Sandoval case the Court has stated that whether or not the Pueblo Indians of New Mexico had be-

come citizens of the United States "remains an open question."

In the Candelaria case, the Court while relying on the Sandoval case, was not advised that the Indians of New Mexico had by Act of Congress been declared citizens of the United States, Title 8 Section 3, U.S.C.A. Thus, we have in the proceedings at bar Indian litigants as plaintiffs and defendants, but Indians who are citizens of the United States litigating over the right or title to property concedingly claimed to be acquired not within the limitations of the Enabling Act, but without such limitations.

Even if the State of New Mexico is wrong in its position that the lands acquired by Pueblo Indians by purchase were not encumbered by restrictions against alienation, a fact which is not conceded, nevertheless the United States not having reserved for itself the power to control lands so acquired, cannot acquire such control absent the consent of the State of New Mexico.